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to be measured by the original delegation to the agent of the right to do certain things: that these things were to be done in a certain way does not prevent the existence of the authority to do the thing, and if the agent chooses a wrong way, the principal should none the less be responsible.⁴ Such reasoning seems preferable to the alternative reasoning that a principal is liable to an outsider only where the facts lie peculiarly within the knowledge of the agent and are not easily ascertainable by the outsider.⁵

In many cases of fraudulent over-issues, however, an independent tort liability is imposed on the principal as arising from his own negligence.⁶ There would seem to be such negligence where blank stock certificates are signed by one of the two necessary parties; for such previous signing is generally unnecessary to the prompt transfer of the certificates. But it is hard to find negligence in the mere giving of blank bills of lading to the master of a vessel, as otherwise it would be impossible for him to transact business.

Except as to this liability for negligence, it is difficult to agree with the many courts which make distinctions with varying results between bills of lading and certificates of stock. The agent acts within the scope of his employment in both cases alike; so that the principle of *respondeat superior* should equally apply. In both cases the facts are peculiarly within the knowledge of the agent and ascertainable with difficulty by a defrauded purchaser of the instrument. Each document is a continuing representation by the principal. Neither is strictly a negotiable instrument, yet both have become so by custom; and both alike are symbols of property; and the fact that the principal derives no benefit from negotiability should not prevent acknowledgment that there is now this general custom.⁷ A recent New York case refuses to apply the there recognized liability of principals on both bills of lading and stock certificates to certificates of indebtedness in the form of stock certificates issued by a cemetery corporation. *American, etc., Bank v. Woodlawn Cemetery*, 87 N. E. 107 (Ct., App.). The reasoning of the court that the reasons that make stock certificates negotiable do not apply to certificates of indebtedness is difficult to adopt; for in both the corporation would seem benefited by their negotiability. A further ground of dissent might be found in the unfairness resulting from allowing a denial that certificates in what appeared to be a negotiable form were not so in fact.

THE RESPONSIBILITY IN AMERICA FOR THE KEEPING OF ANIMALS. — The American cases on this subject, following the common law, have divided animals into two classes, *ferae naturae* and *mansuetae naturae* — a classification injected into the law of torts for the purpose of determining the liability of the owner or keeper of animals for their vicious acts. The decisions abound with the general statements that the owner or custodian of an animal *ferae naturae* is liable for any injury done by it to a third person

⁴ Willis v. Fry, 36 Leg. Int. (Pa.) 47; W. Md. R. R. v. Franklin Bank, 60 Md. 36.

⁵ Allen v. R. R. Co., 150 Mass. 200.

⁶ Allen v. R. R. Co., *supra*; Titus v. Turnpike Rd., 61 N. Y. 237, 242; Havens v. Bank, 132 N. C. 214; Moores v. Bank, 111 U. S. 156. Manhattan Life Ins. Co. v. 42d etc., R. R., 46 N. Y. St. 130, *contra*, on the point that the purchaser was put on notice. See 18 HARV. L. REV. 144.

⁷ See 19 HARV. L. REV. 391.

irrespective of the owner's carefulness in the matter or of the gentleness of disposition previously displayed by the animal;¹ but that the owner of a domestic animal is not liable for its attack upon man or beast unless he knew of its vicious propensity.² Knowledge of an ugly disposition once having been proved, however, animals of the second class become *ferae naturae* for the purpose of determining the liability of the owner.³ That any such classification is illogical and incorrect seems amply demonstrated by Mr. Thomas Beven in a very able and instructive article, wherein he suggests that at common law "the rule of liability for the mischief done by animals *ferae naturae* is diverse; and the ground of the diversity is whether the mischievous agency is property or not," and maintains "that the liability of the owner of a savage beast is *primâ facie* only, and may be rebutted by showing that the owner is wholly without fault."⁴

But our courts have established the great preponderance of authority that the keeper of a vicious animal is absolutely liable to any person who, without contributory negligence, is injured by such animal and that he cannot exonerate himself by showing that he used the highest degree of care in keeping or restraining the animal.⁵ According to some of these decisions the wrong consists in keeping the animal.⁶ The more cautious courts point out that the keeping of the animal is not the wrongful act; but then take refuge in the broad generalization that the owner is liable as an "insurer," and must at his peril keep it from doing harm.⁷ These same courts place a corresponding liability upon the owner of a domestic animal provided it can be proved that he had notice of the beast's wild or ferocious tendencies.⁸ It is conceived that those courts which are committed to the rule of the absolute liability of the owner or keeper of a vicious animal should, on the necessity for proof of *scienter* on the part of the owner or keeper, classify animals in general according to the prevailing public opinion as to their dangerous propensities.⁹ That the severity of the rule is not likely to be relaxed in these jurisdictions may be inferred from the fact that many of the legislatures have extended the common law liability of the owner of a dog so as not only to relieve the person injured from the burden of proving *scienter*, but even to impose upon the owner a penalty of anywhere from two to ten times the damages awarded by the jury.¹⁰

On the other hand four jurisdictions — New Jersey,¹¹ Vermont,¹² Ohio,¹³ and Minnesota¹⁴ — hold that the liability of the owner for injuries inflicted by a vicious animal is not absolute, but may be avoided by proving a diligence in restraining the animal commensurate with its known propensities. As put by the Ohio court "the gist of such an action as this is not the

¹ Vreedenburg v. Behan, 33 La. Ann. 627.

² Reed v. Southern Express Co., 95 Ga. 108.

³ Harris v. Carstens Packing Co., 43 Wash. 647.

⁴ 22 HARV. L. REV. 465, 468, 482.

⁵ Vreedenburg v. Behan, *supra*; Hayes v. Miller, 150 Ala. 621.

⁶ Woolf v. Chalker, 31 Conn. 121, 130-131.

⁷ Muller v. McKesson, 73 N. Y. 195.

⁸ Woolf v. Chalker, *supra*; Muller v. McKesson, *supra*; Marble v. Ross, 124 Mass. 44; Harris v. Carstens Packing Co., *supra*; Ahlstrand v. Bishop, 88 Ill. App. 424.

⁹ Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

¹⁰ E. g. Pub. Stat. N. H. 1901, § 370.

¹¹ De Gray v. Murray, 69 N. J. 458.

¹² Worthen v. Love, 60 Vt. 285.

¹³ Hayes v. Smith, 62 Oh. St. 161.

¹⁴ Fake v. Addicks, 45 Minn. 37.

keeping of the dog with knowledge of his dangerous nature, but rather the negligent failure to properly restrain the animal." ¹⁵ It may further be added that with Mr. Beven such other eminent writers on the law of torts as Bishop ¹⁶ and Cooley ¹⁷ support the views of these courts.

MARKETABLE TITLE IN EQUITY AND AT LAW. — If the vendor in a contract for the sale of land cannot furnish marketable title, equity will not decree specific performance. The burden of proof is upon the purchaser; ¹ but in order to show title unmarketable, proof that it is in fact defective is not necessary: ² the establishment of a certain degree of doubt in the mind of the court as to its validity will suffice. The reason for this departure from the ancient procedure whereby the chancellor, like the common law judge, had no discretion in the matter, but was wont to pronounce the title good or bad and decree or refuse specific performance accordingly, is, that as the decree of equity is *in personam*, it in no way binds parties not before the court. ³

The doubt in the mind of the court may be based upon fact or upon law. It may be that a fact constituting an element in the vendor's chain of title cannot be, ⁴ or is not, proven; ⁵ or it may be that the happening of an event which would weaken the title is not improbable. ⁶ In any case, if there remains in the mind of the court a doubt not remote, ⁷ but rational, — such doubt as would deter a court of law from instructing the jury to find the facts upon which the vendor's title depends, ⁸ — the title is not marketable. For the purchaser, if compelled to take it, might have to defend against subsequent attack by parties not before the court; and a title depending for its validity upon a suit either at law or in equity is not marketable. ⁹ Where the facts are admitted by demurrer and so settled for all purposes of the particular suit, as it is open to a party not before the court to show the facts to be different at a subsequent trial, the title may be unmarketable because doubtful in fact, although the precise question upon which the court hesitates is one of law presented by the demurrer. ¹⁰

Again, the validity of the vendor's title may turn upon the establishment of a general principle of law, ¹¹ or the construction of particular instruments, ¹² or statutes, ¹³ or the constitutionality of a statute, ¹⁴ or the merits of a *lis pendens*, ¹⁵ — in all of which instances an adjudication involves passing upon

¹⁵ Hayes v. Smith, 62 Oh. St. 161, 182.

¹⁶ Bishop, Non-Contr. Law, 1225, 1230.

¹⁷ 2 Cooley, Torts, 3 ed., 696-697, 706-708.

¹ Rosenblum v. Eisenberg, 123 N. Y. App. 896, 899.

² See Spencer v. Sandusky, 46 W. Va. 582, 585.

³ See Gill v. Wells, 59 Md. 492; Richmond v. Gray, 85 Mass. 25.

⁴ Lowes v. Lush, 14 Ves. Jr. 547. See Shriver v. Shriver, 86 N. Y. 575, 585.

⁵ Fleming v. Burnham, 100 N. Y. 1, 11.

⁶ Kilpatrick v. Barron, 125 N. Y. 751, 755.

⁷ Tolosi v. Lese, 120 N. Y. App. 53, 59.

⁸ See Shriver v. Shriver, *supra*.

⁹ See Brokaw v. Duffy, 165 N. Y. 391, 399.

¹⁰ Abbott v. James, 111 N. Y. 673, 677.

¹¹ Taylor v. Chamberlain, 39 N. Y. Supp. 737.

¹² Cunningham v. Blake, 121 Mass. 333; Richards v. Knight, 64 N. J. Eq. 196, 204.

¹³ Daniel v. Shaw, 166 Mass. 582.

¹⁴ Daniel v. Shaw, *supra*.

¹⁵ Hayes v. Nourse, 114 N. Y. 595, 604. But see Linn v. McLean, 80 Ala. 360, 367.